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No. 03-261

IN THE

Supreme Court of the United States

JEAN FAWCETT,

Petitioner,

v.

COLIN McROBERTS AND TAMMY McROBERTS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE SCOTTISH MINISTERS CONSTITUTED UNDER THE SCOTLAND ACT 1998 AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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MOTION OF THE SCOTTISH MINISTERS CONSTITUTED UNDER THE SCOTLAND ACT 1998 FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the Rules of this Court, the Scottish Ministers constituted under the Scotland Act 1998 hereby move for leave to file the accompanying brief as *amici curiae* in support of petitioner.

The Scottish Ministers are responsible for the administration of functions devolved from the Government of the United Kingdom under the Scotland Act 1998. The Scottish Ministers comprise the First Minister, the Lord Advocate, the Solicitor General, and such other Ministers as are from time to time appointed under Section 47 of that Act. The functions devolved on the Scottish Ministers include the administration in Scotland of the Hague Convention on the Civil Aspects of

International Child Abduction.[1] The Scottish Ministers therefore have an interest in the correct interpretation of the Convention, and in securing the prompt return of children unlawfully removed from Scotland.

Petitioner Jean Fawcett and Respondent Colin McRoberts were married and subsequently divorced in Scotland, and their child Travis McRoberts was born and lived in Scotland. Mr. McRoberts removed Travis from Scotland to the United States in violation of Ms. Fawcett's rights under the Children (Scotland) Act 1995, and in breach of an express undertaking given by Mr. McRoberts to the Sheriff Court of Ayr, Scotland.

The Sheriff Court promptly entered an order finding that the removal violated Mr. McRoberts's undertaking and Ms. Fawcett's statutory rights, holding Mr. McRoberts in contempt of court, authorizing his arrest, and imposing a substantial fine. The U.S. court of appeals nevertheless has held that, at the time of the removal, neither Ms. Fawcett nor the Sheriff Court had "rights of custody" within the meaning of the Convention.

The Scottish Ministers submit that the decision of the court of appeals is in error, and poses an obstacle to the proper operation of the Hague Convention between Scotland and the United States, and more generally, given the wide use of statutory and judicially ordered non-removal ("*ne exeat*") clauses to regulate post-separation and divorce arrangements and to ensure the jurisdictional primacy of the state of habitual residence in matters affecting the children concerned. The Government of the United Kingdom supports the filing of this brief on behalf of the Scottish Ministers.

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[1] Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89.

This motion is necessary because Respondent's counsel has refused to give a definite answer to written and telephonic requests for consent to the filing of this brief.

Respectfully submitted,

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QUESTION PRESENTED

The Scottish Ministers will address the following question:

Whether the removal of a child from Scotland to the United States breached "rights of custody" within the meaning of the Hague Convention on the Civil Aspects of International Child Abduction, where: (1) the removal violated an express undertaking given by the child's father to the Sheriff Court of Ayr, Scotland, not to remove the child to the United States pending further judicial proceedings; and (2) the Sheriff Court entered an order holding that the removal was in breach of both the father's undertaking to the court and the mother's rights under the Children (Scotland) Act 1995.

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INTEREST OF THE AMICI CURIAE

The Scottish Ministers are responsible for the administration of functions devolved from the Government of the United Kingdom under the Scotland Act 1998.[1] The Scottish Ministers comprise the First Minister, the Lord Advocate, the Solicitor General, and such other Ministers as are from time to time appointed under Section 47 of that Act. The functions devolved on the Scottish Ministers include administration in Scotland of the Hague Convention on the Civil Aspects of International Child Abduction (hereinafter "Hague Convention" or "Convention").[2] The Scottish Ministers therefore have an interest in the correct interpretation of the Convention, and in securing the prompt return of children unlawfully removed from Scotland.

Respondent Colin McRoberts removed his son Travis McRoberts from Scotland to the United States in violation of Ms. Fawcett's rights under the Children (Scotland) Act 1995, and in breach of the father's express undertaking recorded by the Sheriff Court of Ayr, Scotland. The Sheriff Court entered an order finding that the removal violated the undertaking and Ms. Fawcett's statutory rights, holding Mr. McRoberts in contempt of court, authorizing his arrest, and imposing a substantial fine. The U.S. court of appeals nevertheless has held that, at the time of the removal, neither Ms. Fawcett nor the Sheriff Court had "rights of custody" within the meaning of the Convention.

The Scottish Ministers submit that the decision of the court of appeals is in error, and poses an obstacle to the proper operation of the Hague Convention not only between Scotland and the United States, but also more generally, given the wide use of statutory and judicially-ordered non-removal ("*ne exeat*") clauses to regulate post-separation and divorce arrangements and to ensure

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[1] Pursuant to Supreme Court Rule 37.6, counsel for the *amici* certifies that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than the *amici* or its counsel has made a monetary contribution to the preparation or submission of this brief.

[2] Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89.

the jurisdictional primacy of the state of habitual residence in matters affecting the children concerned. The Government of the United Kingdom supports the filing of this brief on behalf of the Scottish Ministers.

STATEMENT

1. The Hague Convention. The Convention is intended to "protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access."[3] Seventy-four countries, including the United Kingdom and the United States, have ratified or acceded to the Convention since it was finalized in 1980.[4] The U.S. Congress enacted legislation implementing the Convention in 1988.[5]

The Convention requires the prompt return of children who have been wrongfully removed from or retained in a contracting state. In ruling on a petition for return under the Convention, a court is not authorized to decide any underlying custody issues on the merits.[6] If the child has been wrongfully removed, custody issues are resolved by authorities in the state of the child's habitual residence.[7]

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[3] Convention, Preamble.

[4] *See* Hague Conference on Private International Law, Status Sheet Convention # 28, Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, *available at* http://www.hcch.net/e/status/abdshte.html.

[5] *See* International Child Abduction Remedies Act ("ICARA"), Pub. L. No. 100-300, 102 Stat. 437 (1988), codified as amended at 42 U.S.C. §§ 11601-10.

[6] *See* Convention Art. 19; 42 U.S.C. § 11601(b)(4).

[7] In limited circumstances, not applicable here, a court is not required to order the return of the child under the Convention, *e.g.*, if a request for return is not made within one year and the child is settled in its new environment, Art. 12; if there is a grave risk that return "would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation," Art. 13(b); or if return "would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms," Art. 20.

The meaning of the phrase "rights of custody" in the Convention is of controlling importance, because it is the existence of "rights of custody" that triggers the right of return. The Convention requires that the child be returned when there is a "breach of rights of custody attributed to a person, an institution, or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention." Art. 3. The Convention further provides: "For the purposes of this Convention . . . 'rights of custody' shall include rights relating to the care of the person of the child *and, in particular, the right to determine the child's place of residence.*" Art. 5(a) (emphasis added). In addition, the Convention provides that "rights of custody" may arise "by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State." Art. 3. If a removal breaches only "rights of access," but not "rights of custody," the Convention does not provide for the return of the child to the country of habitual residence.[8]

The Explanatory Report that accompanied the Convention indicates that the phrase "rights of custody" is to be interpreted broadly. Specifically, the Report states that "the intention is to protect all the ways in which custody of children can be exercised," that "the law of the child's habitual residence is invoked in the widest possible sense," that "the sources from which the custody rights which it is sought to protect derive, are all those upon which a claim can be based within the context of the legal system concerned," and that it is appropriate to adopt "a flexible interpretation of the terms used, which allows the greatest possible number of cases to be brought into consideration."[9]

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[8] The Convention provides that "'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence." Art. 5(b).

[9] Elisa Pérez-Vera, Explanatory Report on the Child Abduction Convention, *reprinted in* III *Actes et Documents de la Quatorzieme Session, Child Abduction,* ¶ 67 (1981).

The drafting history (*travaux preparatoires*) also sheds light on the specific question whether a right to prevent the removal of the child from the state of habitual residence gives rise to a "right[] of custody" within the meaning of the Convention.[10] During the final diplomatic conference on the Convention, Mr. Leal of Canada stated that if "[c]ustody is given to the mother, but the order provides that the child cannot go out of the jurisdiction without the father's consent," and "the mother nevertheless leaves the jurisdiction without such consent," then "that constitutes wrongful removal." Mr. Van Boeschoten of the Netherlands agreed that under the terms of Article 3, the child would have to be returned immediately. Mr. Eekelaar, observer for the British Commonwealth, likewise expressed his view that a parent with a right to be consulted about relocation would be covered under the definition of "rights of custody" in Article 5.[11]

The issue presented here has also been discussed at meetings of the contracting states to review the operation of the Convention; there it has been concluded that an order prohibiting a parent from removing the child from the jurisdiction without the consent of the other parent or the court (a "*ne exeat*" order) gives rise to "rights of custody" within the meaning of the Convention.[12]

2. The Law Of Scotland. The Children (Scotland) Act 1995 (hereinafter "Act") replaced the terminology of "rights of

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[10] "Because a treaty ratified by the United States is not only the law of this land . . . but also an agreement among sovereign powers, [U.S. courts] have traditionally considered as aids to its interpretation the negotiating and drafting history (travaux preparatoires) and the postratification understanding of the contracting parties." *Zicherman v. Korean Air Lines Co., Ltd.*, 516 U.S. 217, 226 (1996).

[11] Hague Conference on Private International Law, Acts and Documents, III *Actes et Documents de la Quatorzieme Session,* Oct. 6-25, 1980, at 266 (quoted in Linda Silberman, *Patching Up the Abduction Convention: A Call for a New International Protocol and a Suggestion for Amendments to ICARA*, 38 Tex. Int'l L.J. 41, 46 n.34 (Winter 2003)).

[12] *See* Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction (Jan. 18-21, 1993), *reprinted in* 33 I.L.M. 225, 233-34 (1994).

custody" and "rights of access" with an enumeration of parental rights and responsibilities. *See* Kenneth McK Norrie, *Children (Scotland) Act 1995*, at 6 (rev. ed. 1998). Section 1 of the Act provides that a parent has the responsibilities, *inter alia*, "to safeguard and promote the child's health, development and welfare"; to provide the child with "guidance" and "direction"; and "to maintain personal relations and direct contact with the child." Act § 1(1). Section 2 of the Act provides that a parent, in order to fulfill these responsibilities, has the rights, *inter alia*, "to have the child living with him or otherwise to regulate the child's residence"; "to control, direct or guide . . . the child's upbringing"; and "to maintain personal relations and direct contact with the child on a regular basis." Act § 2(1).

Subsection 2(3) of the Act expressly provides:

> (3) Without prejudice to any court order, no person shall be entitled to remove a child habitually resident in Scotland from, or to retain any such child outwith, the United Kingdom without the consent of a person described in subsection (6) below.

In turn, Subsection 2(6) provides:

> (6) The description of a person referred to in Subsection (3) above is a person (whether or not a parent of the child) who for the time being has and is exercising in relation to him a right [to regulate the child's residence, or to maintain personal relations and direct contact with the child]; except that, where both the child's parents are persons so described, the consent required for his removal or retention shall be that of them both.

Subsections (3) and (6) of the Act are intended to "make clear that removal by one parent with parental responsibilities and parental rights without the consent of the other parent with parental responsibilities and parental rights amounts to 'wrongful removal' for the purposes of the Hague Convention." Norrie, *supra*, at 12.

Section 11(2) of the Act provides that a Scottish court may issue "an order depriving a person of some or all of his parental

responsibilities or parental rights in relation to a child." Section 11(11) further provides, however, that such an order shall have the effect of depriving a person of a parental right or responsibility "only in so far as the order expressly so provides and only to the extent necessary to give effect to the order." In this respect, Section 11 of the Act

> creates an important change in the law. The old custody orders were assumed . . . to remove any rights of custody which existed in the person who was not awarded custody, even when this was not made plain in the court decree . . . . It is now required that for that result to follow the court must make a specific decision to that effect (taking account of the overarching principle in subs. 7) and the effect must be spelt out in the decree.

Norrie, *supra*, at 32. Under the Act, "[i]f one parent wishes to be in sole control of the child's upbringing with sole decision-making powers, then she or he must apply for the removal of the other's parental responsibilities and parental rights" under the Act and "the onus will be on the applicant" to show "why the other [parent] should be denied responsibilities and rights." *Id.* at 33-34. "If a court denies a parent the right to regulate the child's residence . . . and nothing more, that parent remains subject to all the responsibilities . . . and possessed of all the other rights" set out in Sections 1 and 2 of the Act (and summarized above). *Id.* at 38-39.

3. The Facts Of This Case. Petitioner and Respondent were married in Scotland in 1986. Their child, Travis Colin Patrick McRoberts, was born in Scotland in 1994. "Other than taking occasional vacations with his family, Travis lived his entire life in Scotland prior to the date of his removal." Pet. App. 37a.

In 1998, the Sheriff Court of Ayr, Scotland granted the couple a decree of divorce. Pursuant to the terms of a "Residence Order" and a "Contact Order" issued by the Sheriff Court, Travis lived with his father but had contact with his mother. The court's orders do not extinguish Ms. Fawcett's other parental rights and responsibilities.

In February 2001, Ms. Fawcett became concerned that Mr. McRoberts and his new wife intended to remove Travis to the United States. Ms. Fawcett made an "oral Motion for interim interdict to prevent [Mr. McRoberts] from removing . . . Travis McRoberts . . . from Scotland to the United States of America." On February 15, the Sheriff Court "refused [the] same as Mr. McRoberts . . . gave an undertaking to the Court that he will not remove [Travis] from Scotland to the United States," and adjourned the proceeding "for further evidence to be led." Pet. App. 9a.

Shortly thereafter, Mr. McRoberts removed Travis to Bedford, Virginia, without permission from either the Sheriff Court or Ms. Fawcett. Once in Virginia, Mr. McRoberts took steps to conceal Travis's location from the Sheriff Court and Ms. Fawcett. Pet. App. 9a, 34a.

In March 2001, the Ayr Sheriff Court entered an order finding Mr. McRoberts in contempt of court, authorizing his arrest, and holding that he has

> unlawfully and wrongfully removed the child TRAVIS COLIN PATRICK McROBERTS, born 3 January 1994 outwith the jurisdiction of this Court without the express permission of [Ms. Fawcett] in Contravention of her parental rights in terms of Sections 2(3) and 2(6) of the Children Scotland Act of 1995; . . . [and] . . . in breach of a specific undertaking given and recorded in the Interlocutor of 15 February 2001 not to do so pending determination of the present proceedings.

Pet. App. 33a.

In April 2001, the Scottish Executive Justice Department submitted a request for the return of Travis McRoberts to the National Center for Missing and Exploited Children. C.A. App. 19-24. The request for return states that Ms. Fawcett "raised court proceedings with a view to varying the residence order in her favour," *id.* at 19; that Travis McRoberts "is the subject of the ongoing court proceedings at Ayr Sheriff Court which confers rights of custody on the mother who has a contact order," *id.* at 23,

and that the civil proceedings in progress at the time of the removal include an "action seeking residence of child at Ayr Sheriff Court," *id.*

4. The Decisions Of The Lower U.S. Courts. Ms. Fawcett filed a petition in the United States District Court for the Western District of Virginia, seeking the return of Travis pursuant to the Convention. Following a hearing, the district court held that Travis had been wrongfully removed from Scotland and ordered his return. The district court held that both Ms. Fawcett and the Sheriff Court have "rights of custody" under Scots law that are enforceable under the Convention. Pet. App. 38a-50a.

The district court recognized that, under Scots law, Ms. Fawcett is entitled to regulate her child's residence and to maintain personal relations and direct contact with him on a regular basis. *Id.* at 39a-40a. The district court emphasized that, although a Scottish court may issue an order depriving a person of some or all of his parental rights, in this case the Sheriff Court specifically found that Travis's removal was "in Contravention of her parental rights" under Sections 2(3) and 2(6) of the Children (Scotland) Act 1995. *Id.* at 42a n.11.

The district court further held that the Ayr Sheriff Court has "rights of custody" for purposes of the Convention. The district court found that Travis had been the subject of numerous proceedings before that court concerning his physical custody, visitation rights, and contact with his parents, and that his removal to the United States occurred "in the midst of one such proceeding" and in violation of Respondent's undertaking to the Sheriff Court. *Id.* at 43a.

The court of appeals reversed.[13] The court recognized that Section 2 of the Children (Scotland) Act 1995 provides Ms. Fawcett with a right "to regulate the child's residence," Pet. App. 21a, but noted that this right had been terminated, with respect to

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[13] Initially, the court of appeals held that this case is not moot as a result of Travis's return to Scotland. Pet. App. 11a-19a. The Scottish Ministers take no position on the mootness question.

the right to determine Travis's residence *within* Scotland, by order of the Sheriff Court. *Id.* at 21a-22a. The court of appeals acknowledged that the divorce decree "permitted Ms. Fawcett to retain other parental rights," *id.* at 23a n.5, but it relied on commentary to an opinion of the Scottish Court of Session for the proposition that "a parent 'clearly loses [her] "rights of custody" [under the Convention] if the other parent is awarded a residence order,'" *id.* at 22a (quoting commentary to *Donofrio v. Burrell*, 2000 S.C.L.R. 465, at 476 (1999)).

The court of appeals also acknowledged that Section 2(3) of the Act "does appear to prohibit Mr. McRoberts from removing Travis from the United Kingdom without Ms. Fawcett's consent." Pet. App. 24a. Indeed, the court noted, "Mr. McRoberts makes no argument to the contrary." *Id.* Citing decisions of the Second and Ninth Circuits, however, the court of appeals held that such "*ne exeat*" provisions do not confer "rights of custody" within the meaning of the Convention. Pet. App. 24a-25a (citing *Gonzalez v. Gutierrez*, 311 F.3d 942 (9th Cir. 2002), and *Croll v. Croll*, 229 F.3d 133 (2d Cir. 2000), *cert. denied*, 534 U.S. 949 (2001)).

The court of appeals further concluded that the district court had "misapprehended the nature of the proceedings pending in the Sheriff Court at the time" of the removal, and that on a proper understanding of these proceedings the Sheriff Court did not have "rights of custody" within the meaning of the Convention. Pet. App. 25a. The court of appeals distinguished the decision of the House of Lords in *In re H (a Minor) (Abduction: Rights of Custody)*, [2000] 2 W.L.R. 337, 2 All E.R. 1, 1999 WL 1319095, on the ground that Ms. Fawcett was not seeking a residence order at the time of Travis's removal. Because the order Ms. Fawcett was seeking "would not have conferred any greater 'rights of custody' on Ms. Fawcett than Section 2(3) of the Children (Scotland) Act, or [a] *ne exeat* clause[ ]," the court of appeals held that the Sheriff Court was not exercising any rights of custody over Travis at the time of his removal from Scotland. Pet. App. 26a-27a.

REASONS WHY THE PETITION SHOULD BE GRANTED

I. THE COURT OF APPEALS' INTERPRETATION OF "RIGHTS OF CUSTODY" CONFLICTS WITH THE INTERPRETATION OF OTHER SIGNATORIES TO THE CONVENTION

A treaty is "an agreement among sovereign powers"; accordingly, U.S. courts consider the "understanding of the contracting parties" in deciding questions of treaty interpretation. *Zicherman v. Korean Air Lines Co., Ltd.*, 516 U.S. 217, 226 (1996). In particular, judicial opinions of "sister signatories" interpreting the treaty are "entitled to considerable weight." *Air France v. Saks*, 470 U.S. 392, 404 (1985). This principle applies with special force to the Convention, because Congress has expressly recognized both "the international character of the Convention" and "the need for uniform international interpretation of the Convention." 42 U.S.C. § 11601(b)(3).

In view of these interpretive principles, it is remarkable that the court of appeals in this case failed to discuss – or even to acknowledge – that its interpretation of the phrase "rights of custody" in the Convention conflicts with judicial decisions of numerous other signatory countries, including Australia, Austria, Canada, England, France, Germany, Hungary, Ireland, Israel, New Zealand, Scotland, and South Africa. Courts in each of these countries hold, contrary to the decision of the court of appeals in this case, that a provision prohibiting removal of a child from its country of habitual residence without the permission of a parent or court (*i.e.*, a *ne exeat* provision) gives rise to "rights of custody" within the meaning of the Convention.[14]

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[14] Summaries of most of the following cases are included in the International Child Abduction Database ("INCADAT"), *available at* http://www.incadat.com: **Australia**: *Director-General Dep't of Families, Youth and Cmty. Care and Hobbs*, 24 September 1999, Family Court of Australia (Brisbane) [INCADAT cite: HC/E/AU 294]; *State Central Authority v. Ayob* [1997] 21 Fam. L.R. 567 [INCADAT cite: HC/E/AU 232]; *In the Marriage of R. v. R.*, 22 May 1991, Full Court of the Family Court of Australia (Perth) [INCADAT cite: HC/E/AU 257]. **Austria**: 2 Ob 596/91, Oberster Gerichtshof (Supreme Court) [INCADAT cite: (...continued)

There is thus no basis for the Second Circuit's statement in *Croll v. Croll* (on which the Fourth Circuit relied in this case) that "the cases worldwide are few, scattered, [and] conflicting." 229 F.3d at 133. More accurate is the statement of the South African Constitutional Court that the decision in *Croll* (and, therefore, the decision in this case) is "contrary to the weight of authority."

HC/E/AT 375]. **Canada**: *Thomson v. Thomson*, [1994] 3 S.C.R. 551 [INCADAT cite: HC/E/CA 11]; *Thorne v. Dryden-Hall*, [1997] 148 D.L.R. (4th) 508 [INCADAT cite: HC/E/CA 12]. **England**: *C. v. C.*, 2 All E.R. 465 (Eng. C.A. 1988) [INCADAT cite: HC/E/UKe 34]; *B. v. B.*, 2 All E.R. 144 (Eng. C.A. 1992) [INCADAT cite: HC/E/UKe 10]; *C. v. C.*, 1 FLR 163 (Fam. 1991) [INCADAT cite: HC/E/UKe 35]. **France**: CA Provence, *Ministere Public v. M.B.*, Mar. 23, 1989, 79 Rev. crit. 1990, M. Sainte, pres. [INCADAT cite: HC/E/FR 62 (summary)]. **Germany**: 2 BvR 1126/97, Bundesverfassungsgericht (Federal Constitutional Court of Germany), 18 July 1997 [INCADAT cite: HC/E/DE 338 (summary)]; 10 UF 753/01, Oberlandesgericht Dresden (High Regional Court), 21 Jan. 2002 [INCADAT cite: HC/E/DE 486 (summary)]. *See also Morton v. Morton*, 982 F. Supp. 675 (D. Neb. 1997) (quoting a German court's opinion that "even one who has only the right to object to the taking of the child to a foreign country has custody rights as per Article 3 and 5 of the Hague [C]onvention"). **Hungary**: *Mezei v. Biro*, 16 June 1998, Capital Court as Appellate Court [INCADAT cite: HC/E/HU 329 (summary)]. **Ireland**: *M.S.H. v. L.H.* [2000] 3 I.R. 390 (Ir. S.C.) [INCADAT cite: HC/E/IE 319]; *H.I. v. M.G.* [2000] 1 I.R. 110 (Ir. S.C.) [INCADAT cite: HC/E/IE 284]. **Israel**: C.A. 5271/92, *Foxman v. Foxman* (H.C. 1992); C.A. 1648/92, *Tourna v. Meshulem* (H.C. 1992). *Foxman* and *Tourna* are discussed in the opinions in *Croll v. Croll*, 229 F.3d at 142 (majority opinion), 151 (Sotomayor, J., dissenting). **New Zealand**: *Re S.* [1997] 1 F.L.R. 486 (H.C.); *Dellabarca v. Christie* [1999] N.Z.F.L.R. 97, 1998 NZFLR LEXIS 79 [INCADAT cite: HC/E/NZ 295]. **Scotland**: *Bordera v. Bordera* [1995] S.L.T. 1176 (Outer House of the Court of Sessions) [INCADAT cite: HC/E/Uks 183]. *See also Pirrie v. Sawacki* [1997] S.L.T. 1160, 1997 SCLR 59, 67 (Outer House of the Court of Sessions) [INCADAT cite: HC/E/Uks 188] (holding, prior to the effective date of the Children (Scotland) Act 1995 that a non-custodial parent whose children had been unilaterally removed from Scotland to the United States had no "rights of custody" for purposes of the Convention, but noting that "[t]he problem for the petitioner in the present case will be met by [section] 3 of the Children (Scotland) Act"). **South Africa**: *Sonderup v. Tondelli*, 2000 (1) SA 1171 (CC) (Constitutional Court of South Africa) [INCADAT cite: HC/E/SA 309].

Sonderup, (1) SA at 1182.[15] The court of appeals' decision also conflicts with decisions of other U.S. courts[16] and the views of leading scholars.[17]

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[15] The Second Circuit identified only three countries (Australia, Israel, and the U.K.) as holding that *ne exeat* provisions create "rights of custody" under the Convention, and two countries (Canada and France) as taking the opposite view. The French decision cited in *Croll* was subsequently disapproved by a higher court. *See supra* note 14. Moreover, the Canadian Supreme Court held in *Thomson v. Thomson*, [1994] 3 S.C.R. 551, that an interim *ne exeat* order issued by a Scottish court vested that court with rights of custody for purposes of the Convention, and ordered the return of the child. Although the Court suggested in *dicta* that a permanent *ne exeat* order might not give rise to "rights of custody," a subsequent decision of a Canadian appellate court holds that a permanent *ne exeat* provision, like an interim provision, gives rise to "rights of custody" under the Convention. *See Thorne v. Dryden-Hall* [1997] 148 D.L.R. (4th) 508. Finally, *D.S. v. V.W.* [1996] 134 D.L.R. (4th) 481, held only that an *implicit* restriction on movement did not confer rights of custody. Although one Justice suggested that an explicit non-removal clause is insufficient to confer "rights of custody," a majority of the Justices expressed reservations about that proposition. *Id.* at 483-84. *See also* Martha Bailey, *"Rights of Custody" Under the Hague Convention*, 11 BYU J. Pub. L. 33, 42-50 (1997) (analyzing Canadian decisions).

[16] *See Janakakis-Kostun v. Janakakis*, 6 S.W. 3d 843 (Ky. Ct. App. 1999), *cert. denied*, 531 U.S. 811 (2000); *David S. v. Zamira S.*, 574 N.Y.S.2d 429 (N.Y. Fam. Ct. 1991) (cited with approval in *Friedrich v. Friedrich*, 78 F.3d 1060, 1065 n.4 (6th Cir. 1996)). *Cf. Shealy v. Shealy*, 295 F.3d 1117 (10th Cir. 2002) (removal justified by an exception to a *ne exeat* provision for military necessity).

The decision in this case is also in considerable tension with the First Circuit's decision in *Whallon v. Lynn*, 230 F.3d 450 (1st Cir. 2000), which holds that the civil law doctrine of "*patria potestas*" confers "rights of custody" within the meaning of the Convention even though it does not involve physical custody of the child. *Patria potestas* involves responsibility for the "physical, mental, moral and social protection of the minor child," including "the obligation for [the child's] guardianship and education," and "the obligation to comport [oneself] in a manner that sets a good example for the children and shall teach them appropriate standards of social interaction." *Id.* at 457.

[17] *See* Paul R. Beaumont & Peter E. McEleavy, *The Hague Convention on the Civil Aspects of International Child Abduction* 72-73, 75-82 (1999) ("[T]he underlying principle should be that a veto over the removal of a child from its habitual residence should ordinarily amount to a right of custody, and its breach should be sufficient to successfully base a return petition."); A. Bucher, *La*

(...continued)

In the leading English case of *C. v. C.*, Lord Donaldson, the Master of the Rolls, explained the reason that *ne exeat* provisions give rise to "rights of custody" within the meaning of the Convention:

> "Custody," as a matter of non-technical English, means "safe keeping, protection; charge, care, guardianship"; but "rights of custody" as defined in the Convention includes a much more precise meaning which will, I apprehend, usually be decisive of most applications under the Convention. This is "the right to determine the child's place of residence." This right may be in the court, the mother, the father, some caretaking institution, such as a local authority, or it may, as in this case, be a divided right – in so far as the child is to reside in Australia, the right being that of the mother; but, in so far as any question arises as to the child residing outside Australia, it being a joint right, subject always to the overriding rights of the court. If anyone, be it an individual or the court or other institution or a body, has a right to object, and either is not consulted or refuses consent, the removal will be wrongful within the meaning of the Convention.

2 All E.R. 465, 473 (Eng. C.A. 1988).[18]

As noted above, in reaching a contrary decision in this case, the Fourth Circuit relied on the decisions of the Second and Ninth Circuits in *Croll v. Croll*, 229 F.3d 133 and *Gonzalez v.*

Famille en droit international prive 283 Recueil des cours 9, 169 n.391 (2000); John M. Eekelaar, *International Child Abduction by Parents*, 32 U. Toronto L.J. 281, 309 (1982); Linda Silberman, *supra* note 11; *but see* A.E. Anton, *The Hague Convention on International Child Abduction*, 30 Int'l Comp. L.Q. 537, 546 (1981).

[18] The Second Circuit in *Croll* sought to distinguish *C. v. C.* on the ground that the order at issue expressly granted "joint guardianship" to both parents, *see* 229 F.3d at 143, but this was clearly not the basis for the decision.

Gutierrez, 311 F.3d 942. Indeed, the Fourth Circuit said little more than that "[w]e find the reasoning of those courts persuasive." Pet. App. 25a. In fact, reasoning of those courts is unsatisfactory.

The Second Circuit "open[ed] the dictionary to find the ordinary meaning or meanings of custody." 229 F.3d at 138. Although recourse to dictionaries is appropriate and useful in many cases, the Second Circuit's approach in this case was flawed in two respects. *First*, the Second Circuit failed to accord due weight to the plain language of Article 5 of the Convention, which defines "rights of custody" as "rights relating to the care of the person of the child and, *in particular, the right to determine the child's place of residence*." (Emphasis added). The Second Circuit dismissed the highlighted language as merely "indicative," and "an apt example of a right of custody." 229 F.3d at 139. But this is contrary to the text of the Convention, which singles out the right to determine the child's place of residence "in particular." Moreover, the Second Circuit observed that a *ne exeat* provision does not give a parent a unilateral right to "determine" the child's place of residence. But, again, this observation is contrary to the text of the Convention, which specifically provides (in Article 3) that rights of custody may be exercised "either jointly or alone."

Second, the Second Circuit relied exclusively on American dictionaries, even though the Convention in Article 3 specifically refers to "rights of custody . . . under the law of the State in which the child was habitually resident" and the U.S. implementing legislation recognizes both the "the international character of the Convention" and "the need for uniform international interpretation of the Convention." 42 U.S.C. § 11601(b)(3). Indeed, as explained below, in this case the Fourth Circuit's understanding of "rights of custody," based solely on American sources, resulted in a serious misunderstanding of Scots family law. *See infra* at 15-19.

In addition to departing from the language of the Convention, the Second Circuit in *Croll* – and the Fourth Circuit in this case – overlooked many of the materials described above that shed light on the intentions of the drafters, including discussions of

this specific issue both before and after the final language of the Convention was adopted.

In sum, the decisions of numerous courts holding that *ne exeat* provisions confer "rights of custody" under the Convention are persuasive. The conflicting decision of the court of appeals should be reviewed by this Court and reversed.

II. THE COURT OF APPEALS MISUNDERSTOOD SCOTS LAW AND FAILED TO ACCORD APPROPRIATE WEIGHT TO THE DECISION OF THE SCOTTISH COURT

As noted above, Article 3 of the Convention refers to rights of custody "under the law of the State in which the child was habitually resident immediately before the removal," while Article 5 provides that, for purposes of the Convention, "rights of custody . . shall include . . . in particular, the right to determine the child's place of residence." In this case, the court of appeals not only misinterpreted the phrase "rights of custody" as defined by Article 5 of the Convention, it also misapplied the law of Scotland and failed to accord appropriate weight to the decision of the Sheriff Court. As the First Circuit has recognized, "care must be taken to avoid imposing American legal concepts onto another culture." *Whallon*, 230 F.3d at 456. On a proper understanding of Scots law, both Ms. Fawcett and the Ayr Sheriff Court have "rights of custody" for purposes of the Convention.

A. Ms. Fawcett Has Rights Of Custody Within The Meaning Of The Convention

The Sheriff Court issued an order holding that Mr. McRoberts's removal of Travis from Scotland "without the express permission of [Ms. Fawcett] was in Contravention of her parental rights in terms of Sections 2(3) and 2(6) of the Children Scotland Act of 1995," and "in breach of a specific undertaking given and recorded in the Interlocutor of 15 February 2001 not to do so pending determination of the present proceedings." Pet. App. 33a. Despite this order, the Fourth Circuit held that the decree of divorce issued by the Sheriff Court "modified the parental rights that Ms. Fawcett would have otherwise had under § 2 of the Children (Scotland) Act" by "giv[ing] Mr. McRoberts

the exclusive power to determine Travis's residence, thereby necessarily depriving Ms. Fawcett of that same right." Pet. App. 22a. The court of appeals did not attempt to reconcile its decision with the contrary order of a Scottish court – indeed, the very Scottish court that issued the decree of divorce. The court of appeals' decision thus fails to give effect to Sections 2(3) and 2(6) of the Children (Scotland) Act 1995, which "make clear that removal by one parent with parental responsibilities and parental rights without the consent of the other parent with parental responsibilities and parental rights amounts to 'wrongful removal' for the purposes of the Hague Convention." Norrie, *supra*, at 12.

The court of appeals also erred in holding that Ms. Fawcett had no other rights under Scots law that amount to "rights of custody" under the Convention. As noted above, "[t]he expression 'rights of custody' and its traditional corollary, 'rights of access' have fallen out of use in contemporary family law. In England and Scotland the Children Acts of 1989 and 1995 have replaced such terms with the ideas of parental rights and responsibilities." Beaumont & McEleavy, *supra* note 17, at 74. In Scotland, "[t]here is now increased recognition of the role to be played by both parents in the life of a child following the break-up of a marriage or relationship. Consequently, even if one parent assumes the role of primary carer it is now more likely that the other will be allowed greater involvement than mere periodic visitation, whether through a judicially appointed order or a statutory right." *Id.* at 75.

Even prior to the enactment of the Children Acts of 1989 and 1995, "a right of custody proceeded beyond mere physical possession; rather it incorporated a 'bundle of rights' with respect to the care of the minor which may be vested in a number of persons, or shared between an individual and an institution." *Id.* at 76 n.193 (citation omitted).[19] Under both English and Scots law "a

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[19] "In common law, the term 'custody' does not simply mean the actual possession of the child (this is often referred to as 'care and control') but refers to a bundle of 'rights' respecting the child. These will include the day to day care of the child, but can also comprehend the rights to determine the child's religion, education and place of residence." John Eekelaar, *The Hague Convention on the Civil Aspects of International Child Abduction: Explanatory Documentation* (...continued)

parent who enjoyed rights of access alone may also have been attributed rights to determine the child's education, medical treatment, or most importantly in this context, his or her place of residence." *Id.* (citations omitted).

These principles were confirmed and extended by the Children (Scotland) Act 1995. As noted above (at pages 4-6), the Act provides that a parent shall have the right "to control, direct or guide, in a manner appropriate to the stage of development of the child, the child's upbringing," "to maintain personal relations and direct contact with the child on a regular basis," "to safeguard and promote the child's health, development and welfare," and "to provide, in a manner appropriate to the stage of development of the child . . . direction . . . [and] guidance to the child," as well as the right to regulate the child's residence.[20]

The Fourth Circuit observed that the parental rights and responsibilities recognized by the Children (Scotland) Act 1995 may be modified or terminated by a court order pursuant to Section 11 of the Act. The court of appeals failed to note, however, that a court order shall have the effect of depriving a person of a parental right or responsibility "only in so far as the order expressly so provides and only to the extent necessary to

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Prepared for Commonwealth Jurisdictions 15-17 (Commonwealth Secretariat 1981).

[20] In support of its conclusion that "rights of custody" means a residence order under Scots law, the court of appeals relied on commentary to the opinion of the Scottish Court of Session in *Donofrio v. Burrell*, 2000 S.C.L.R. 465 (1999). The court of appeals' reliance on this commentary (which has no weight as legal precedent) was unwarranted in view of the considerations set out above. *Donofrio v. Burrell* involved a removal from Canada to Scotland, and thus the relevant national law was Canadian. In addition, the father did not seek the return of the child to Canada, but instead sought only access to the child in Scotland. The issue before the court was whether the father had followed the proper procedures to make such an application. The court observed in passing that "return was not, and is not, insisted in" because the removal was "not in breach of rights of custody." This was an unremarkable statement, in view of the fact that there is no mention of a *ne exeat* provision or any other basis for asserting "rights of custody" under the Canadian law.

give effect to the order," Act § 11(11), and that the orders of the Sheriff court in this case did not expressly deprive Ms. Fawcett of her rights and responsibilities to provide direction and guidance to Travis and to safeguard and promote his health, development, and welfare. Accordingly, Ms. Fawcett's rights and responsibilities under Scots law are sufficient to confer "rights of custody" within the meaning of the Convention.

B. The Sheriff Court Has Rights Of Custody Within The Meaning Of The Convention

The court of appeals also held that the Sheriff Court lacks "rights of custody" within the meaning of the Convention. The court recognized that its ruling on this issue potentially placed it in conflict with the decision of the House of Lords in *In re H*, 1999 WL 1319095, which holds that courts may have "rights of custody" within the meaning of the Convention and that a parent may assert those rights in a petition for return of the child. Pet. App. 26a (citing *In re H*). The court of appeals accepted the decision in *In re H* but sought to distinguish it on the ground that "the application pending in the Sheriff Court *at the time* Mr. McRoberts left Scotland with Travis" did not "raise matters of custody within the meaning of the Convention," because Ms. Fawcett had not applied for a residence order. Pet. App. 26a. This is incorrect, for several reasons.

First, as explained above and in the request for return filed by the Scottish Executive Justice Department, Ms. Fawcett "raised court proceedings [in the Ayr Sheriff Court] with a view to varying the residence order in her favour." C.A. App. 19; *see also id.* at 23 (civil proceeding in progress at the time of the removal consisted of an "action seeking residence of child at Ayr Sheriff Court").

Second, even if Ms. Fawcett had not been seeking a residence order, for the reasons explained above (at pages 10-15), a *ne exeat* provision gives rise to "rights of custody" within the meaning of the Convention. It is undisputed that the undertaking given by Mr. McRoberts not to remove Travis from Scotland without permission was "an agreement having legal effect under the law of that State," Convention Art. 3, and that the matter remained pending before the Sheriff Court at the time of the removal.

Third, as explained above (at page 16-17), even apart from her application for a residence order and her *ne exeat* rights, Ms. Fawcett had a bundle of parental rights and responsibilities with respect to Travis sufficient to give rise to "rights of custody" under the Convention. In applying for an interdict to prevent Travis's removal to the United States, Ms. Fawcett sought to protect her ability to exercise these rights and responsibilities, as well as her shared right to determine whether Travis should live outside Scotland. For this reason, as well, her application raised "rights of custody" for purposes of the Convention.

III. THE DECISION OF THE COURT OF APPEALS UNDERMINES THE NEED FOR UNIFORM INTERNATIONAL INTERPRETATION OF THE CONVENTION

This Court will grant a petition for a writ of certiorari when "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10. This case presents an important question concerning the proper interpretation of an important treaty, which, by virtue of the Supremacy Clause, is "the supreme law of the land." U.S. Const. art. VI, § 2. Congress has specifically recognized "the need for uniform international interpretation of the Convention." 42 U.S.C. § 11601(b)(3). The court of appeals in this case has interpreted the Convention in a way that conflicts with judicial decisions of other signatories to the Convention. Congress's recognition of the need for uniform international interpretation, as well as considerations of international comity, indicate that if the United States is to disagree with its fellow contracting parties on a vital question concerning the meaning and scope of the Convention, that question should be considered and decided by this Court.

The need for uniform international interpretation also counsels against delaying review by this Court. So long as the decisions of the courts of appeals remain in effect, the goal of uniform international interpretation is frustrated throughout large areas of the United States. Although the issue is certain to arise in future cases, and a conflict in the circuits may arise at some point, the issue has now been considered by multiple U.S. and non-U.S.

courts, and there is no reason to believe that this Court would benefit from allowing the lower courts additional time to consider the issue.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to invite the Solicitor General to submit a brief setting forth the views of the United States on the question presented. *See Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185-85 (1982) ("[T]he meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.").

Respectfully submitted,

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